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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES SERVICE,
et al.,**

Defendants.

Case No.: 3:01-CV-00640-SI

**STATUS REPORT RE: 2019-
2021 SPILL OPERATIONS
AGREEMENT DURING THE
NEPA REMAND PERIOD**

Federal Defendants, Oregon, Washington, and the Nez Perce Tribe submit this status report to notify the Court that the U.S. Army Corps of Engineers, the Bonneville Power Administration, the U.S. Bureau of Reclamation, Oregon, Washington, and the Nez Perce Tribe (“signatory parties”) have reached an agreement on fish passage spill operations and related matters during the remainder of the National Environmental Policy Act (NEPA) remand period. For context and informational purposes only,¹ the agreement is attached as Exhibit 1 (“Agreement”). The Agreement reflects the intent of the signatory parties to set aside differing positions and work collaboratively on fish passage spill operations during the NEPA remand period. *See generally* Exhibit 1. The Agreement has two other effects that relate to this litigation:

1. The U.S. Army Corps of Engineers, Bonneville Power Administration, and the U.S. Bureau of Reclamation (Action Agencies) will modify their proposed action that is the subject of an ongoing Section 7(a)(2) Endangered Species Act (ESA) consultation with the National Marine Fisheries Service (NMFS). The modified proposed action will identify the fish passage spill operations documented in the Agreement, and NMFS intends to complete an ESA consultation before spring fish passage spill operations begin in April 2019.² In the interim, the Action Agencies and NMFS will take any necessary administrative steps to address incidental take occurring between the expiration of the 2008/2014 biological opinion and NMFS’s completion of consultation in April

¹ As the signatory parties provided in the Agreement, the Agreement is not intended to constitute a consent decree, be entered as a Court order, or be enforceable in this action. Exhibit 1 at IX.C.2, X.C. If the Court enters any of the provisions of the Agreement as a Court order, the Agreement automatically terminates. *Id.* Federal Defendants, moreover, object to the entry of an order adopting or modifying any of the provisions of the Agreement, and Federal Defendants request an opportunity to be heard if the Court considers entering an order adopting or modifying any of the terms of the Agreement.

² The agencies previously anticipated completing the ESA consultation process by the end of December 2018. *See* ECF 2271 (discussing the ongoing ESA consultation and Federal Defendants’ intent to complete that consultation on or before December 31, 2018).

2019. The signatory parties believe these procedural adjustments are compatible with the Court's April 17, 2018, Order that removed the December 31, 2018, consultation deadline. *See* ECF 2288.

2. While this Agreement is in effect, the signatory parties agree not to engage in any litigation—including filing supplemental complaints or seeking declaratory or injunctive relief—during the NEPA remand period as described in Exhibit 1 at X.A. The undersigned parties conferred with the other parties consistent with LR 7-1(a). The National Wildlife Federation, *et al.*, Plaintiffs represented that they also do not intend to engage in any litigation in the above-captioned case during the NEPA remand period—including filing supplemental complaints or seeking declaratory or injunctive relief—while this Agreement is in effect.³

In sum, the Agreement reflects that the signatory parties are working collaboratively on fish passage spill operations and related matters during the NEPA remand period. While this Agreement is in effect, the signatory parties and the National Wildlife Federation, *et al.*, Plaintiffs do not intend to engage in any litigation. If these circumstances change (*e.g.*, the Agreement terminates), the signatory parties will notify the Court.

Dated: December 18, 2018

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³ The Confederated Tribes of the Umatilla Reservation, the Confederated Tribes of the Warm Springs, and the State of Idaho indicated that they support the Agreement. The Confederated Salish and Kootenai Tribes, the Kootenai Tribe of Idaho, and the State of Montana collectively do not oppose the Agreement so long as its implementation does not adversely affect or preclude the improvement of the Montana Operations. The remaining defendant-intervenors or amici indicated that they do not oppose/take no position (Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Colville Reservation, Northwest RiverPartners, Inland Ports and Navigation Group) or did not respond.

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/s/ Michael R. Eitel

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CERTIFICATE OF SERVICE

I certify that on December 18, 2018, the foregoing was electronically filed through the Court's electronic filing system, which will generate automatic service on all Parties enrolled to receive such notice. I also certify that the following will be manually served via overnight mail:

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